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IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*,
Appellants,

v.

TAXATION WITH REPRESENTATION OF WASHINGTON, *Appellee*.

On Appeal From The United States Court of Appeals For The District Of Columbia Circuit

AMICUS CURIAE BRIEF OF AMERICAN ASSOCIATION OF MUSEUMS, AMERICAN COUNCIL FOR THE ARTS, AMERICAN HEART ASSOCIATION, THE AMERICAN NATIONAL RED CROSS, CAMP FIRE, INC., GIRL SCOUTS OF THE USA, GIRLS CLUBS OF AMERICA, INC., GOODWILL INDUSTRIES OF AMERICA, LUTHERAN COUNCIL IN THE USA, MARCH OF DIMES BIRTH DEFECTS FOUNDATION, NATIONAL AUDUBON SOCIETY, NATIONAL BOARD OF YMCAs, NATIONAL COMMITTEE FOR RESPONSIVE PHILANTHROPY, NATIONAL CONFERENCE OF CATHOLIC CHARITIES, NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE USA, NATIONAL COUNCIL OF LA RAZA, NATIONAL EASTER SEAL SOCIETY, INC., NATIONAL MENTAL HEALTH ASSOCIATION, NATIONAL WILDLIFE FEDERATION, PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., UNITED WAY OF AMERICA, AND INDEPENDENT SECTOR, IN SUPPORT OF APPELLEE.

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INTEREST OF AMICI CURIAE

Amici curiae are publicly-supported charitable organizations whose objectives include relief of the poor, care for the sick, promotion of education, protection of children, and advancement of physical, mental, and spiritual health. *Amicus curiae* Independent Sector was formed in 1980 to preserve and enhance this Nation's tradition of giving, volunteering, and not-for-profit initiative; its 450 members and affiliates include many of the major philan-

thropic and voluntary organizations in the country.[1] All *amici* are exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code[2] and are qualified to receive tax-deductible charitable contributions under section 170(c)(2).

This case is of exceptional importance to the Nation's charities, to the people they serve, and to society at large. In their efforts to accomplish charitable purposes, *amici* find it desirable—often necessary—to take positions on legislation at the national, state, and local levels. The lobbying restrictions of the Internal Revenue Code severely limit the permissible scope of such legislative activities, and thus impair *amici's* ability to achieve their philanthropic goals. *Amici* urge this Court to invalidate these restrictions as violative of public charities' First Amendment rights.

Counsel for both parties have consented to the filing of this brief. Letters of consent are on file with the Clerk.

SUMMARY OF ARGUMENT

Provisions of the Internal Revenue Code relating to charitable organizations explicitly condition valuable Government benefits (tax exemption and the ability to receive tax-deductible contributions) upon charities' waiver of First Amendment rights (the right to engage in "substantial" legislative advocacy). These provisions go beyond a mere Government refusal to subsidize lobbying, the situation before this Court in *Cammarano* v. *United*

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[1] Independent Sector acts in this matter through its board of directors; its joining in this Brief does not imply that each of its member organizations has taken a position on the questions presented here.

[2] All statutory references are to the Internal Revenue Code of 1954, as amended (the "Code" or "IRC"), unless otherwise indicated.

States, 358 U.S. 498 (1959). The provisions challenged here affirmatively *penalize* legislative action by charities. Because these provisions are not narrowly drawn to serve a compelling state interest, they are a classic example of an "unconstitutional condition" on free speech.

In response to this argument, the Court of Appeals suggested the use of sophisticated tax planning. A sister organization, in that Court's view, could "easily" be created under other provisions of the Code to lobby on a charity's behalf. It is, however, alien to the First Amendment to force one person, barred from speech, to exercise his rights through another. Moreover, the various practical problems that encumber the suggested "dual organizational structure" constitute independently sufficient grounds for rejecting it as an answer to charities' First Amendment claims.

Analyzed under traditional First Amendment criteria, the challenged lobbying restrictions are constitutionally infirm. They should be declared invalid. Such a declaration would avoid the necessity of reaching the Equal Protection issues on which the Court of Appeals rested its decision, as well as the troublesome remedy envisioned by that Court.

ARGUMENT

I. Legislative Activies Are A Proper And Important Means Of Furthering Charitable Purposes.

It is useful at the outset to focus precisely on what is at issue here. This case involves *legislative* activity by *publicly-supported* charities in furtherance of their *philanthropic* objectives.

The law of charitable trusts explicitly recognizes the importance and propriety of legislative advocacy as a means of achieving philanthropic objectives. *See* Bogert,

Trusts and Trustees § 378, at 188-91 (2d ed. 1977); 2 Restatement (Second) of the Law of Trusts § 374, at 257, 260 (1959); 4 Scott on Trusts § 374.4, at 2912 (3d ed. 1967). Charities employ legislative action as a means to an end. The end may be promotion of racial equality, prevention of cancer, or protection of children. The means may be funding scientific research, publishing sociological studies, or conducting public education programs. These activities are not necessarily "charitable" *per se;* rather, they have a "charitable" character because of the purposes they promote.[3] Legislative action is no different in principle from these other activities. When a charity employs legislative advocacy as a means to further its philanthropic objectives, that advocacy is no less proper—and no less charitable—than any other activity the charity undertakes.

Longstanding Treasury regulations also establish that the general law of charitable trusts governs the meaning of "charitable" for federal tax purposes. The regulations expressly provide that "the term 'charitable' is used in section 501(c)(3) in its generally accepted legal sense." Treas. Reg. § 1.501(c)(3)-1(d)(2). *See, e.g.*, Rev. Rul. 78-85, 1978-1 C.B. 150 (citing law of charitable trusts). There can thus be no doubt that legislative activity in furtherance of a charity's philanthropic ends is not only permissible activity, but is *charitable* activity, for tax and non-tax purposes alike.

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[3] The word "charitable" is used throughout this Brief in its generally accepted tax sense, *i.e.*, as an all-encompassing term that includes various more specific purposes (educational, religious, scientific, and the like) that may qualify an organization for tax exemption under section 501(c)(3). *See* Treas. Reg. § 1.501(c)(3)-1(d)(2). The Court need not here address the questions as to the meaning of the term that are presented in *Goldsboro Christian Schools, Inc.* v. *United States*, No. 81-1, *argued*, 51 U.S.L.W. 3300 (U.S. Oct. 19, 1982).

This is not merely an academic or theoretical point. In practice, the ability of many charitable organizations to fulfill their mission depends upon their freedom to participate in the legislative process. Typical examples of *amici's* legislative activities underscore this fact:

The National Mental Health Association is organized to prevent mental illness and provide better services for the mentally disabled. Many States have laws governing civil commitment and treatment of the mentally disturbed that fail to reflect advances made by contemporary psychiatric research. In an effort to secure better and more humane treatment for the mentally ill, the Association and its local chapters have supported revision of such laws and the enactment of modern community mental health codes.

The National Conference of Catholic Charities is dedicated to promotion of religious values, provision of social services to people and families in crisis, and relief of the economically disadvantaged. In an effort to help poor families secure decent housing, the Conference's local affiliates have supported enactment of state laws prohibiting landlords from refusing to rent apartments to people because they are poor or because they have children.

The American Heart Association seeks to reduce death and disability from cardiovascular disease. Scientific research, financed both by the Association and the Federal Government, demonstrates that smoking, hypertension, and high cholesterol levels are leading causes of heart attack and stroke. In an effort to reduce the risk of heart disease, the Association has supported enactment of legislation that would establish local emergency medical services and help inform people of the dangers of smoking and high fat diets.

The National Audubon Society is dedicated to the protection of wildlife and other natural resources. In an effort to help save endangered species from extinction, the Society has supported enactment of state laws that protect cranes, bald eagles, and other birds.

The Girl Scouts of the USA and its local affiliates provide a variety of services to millions of young people nationwide. In furtherance of its charitable purposes, the Girl Scouts has supported enactment of federal laws that encourage States to provide preventive medical treatment to children from poor families, and to provide community-based services as alternatives to detention of juvenile delinquents.

As these examples show, legislative activity is simply one means (among many permissible means) by which charities strive to accomplish their basic charitable goals. Many philanthropic goals can be achieved only by a change in law. Influencing legislation is often indispensable if charities are to fulfill the purposes for which they were established.[4]

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[4] Although legislative activity is often important to charities, it is also true that lobbying occupies a minor niche in the scheme of overall charitable endeavor. The Government, citing the large number of organizations that are tax exempt under section 501(c)(3), suggests that invalidation of the lobbying restrictions will open a "Pandora's Box of woes and abuse." Brief ("Br.") at 8. The Government's implication that charities, absent restrictions on their legislative advocacy, will abandon their basic functions and become full-time lobbyists is simply wrong. Universities will continue to educate students, the Red Cross will continue to rescue earthquake victims, and hospitals will continue to treat the sick, regardless of how the Internal Revenue Code deals with lobbying. Invalidation of the challenged restrictions will simply free charities to operate without fear of disastrous tax consequences in those circumstances where legislative activity is vital to accomplishment of their charitable goals.

It is likewise useful to stress at the outset what this case does *not* involve. The Internal Revenue Code, besides limiting charities' legislative advocacy, flatly prohibits charities from engaging in political activities on behalf of candidates for public office. IRC § 501(c)(3). The interdiction against political campaign activity is based on an entirely different set of governmental policies, and the constitutionality of those provisions is not in question here. *Cf. Buckley* v. *Valeo*, 424 U.S. 1 (1976). In addition, besides limiting the scope of legislative activity by public charities,[5] the Code imposes separate and more stringent limitations on legislative activity by private foundations. *See* IRC § 4945. These latter provisions are part of a comprehensive statutory pattern, enacted by Congress in 1969, that regulates private foundations' investment holdings, income distribution policies, and transactions with related parties. These provisions reflect a congressional judgment that particularly severe anti-abuse restrictions are required in the case of private foundations because they are funded by a single individual or a small group and thus lack the discipline of public support. *See* S. Rep. No. 91-552, 91st Cong., 1st Sess. 56-59 (1969). The constitutionality of the private foundation lobbying provisions is likewise not in issue here. This case involves restrictions on *legislative* activity by *publicly-supported* charities in furtherance of their *philanthropic* objectives.

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[5] "Public charities" include churches, schools, hospitals, and other section 501(c)(3) organizations that receive a substantial part of their financial support from the general public. *See* IRC § 509(a); Treas. Reg. § 1.170A-9(h)(4)(ii). Although the term "public charity" is not defined in the Code, it has become the common shorthand expression for charitable organizations that are not private foundations.

II. The Restrictions On Charities' Legislative Activities Impose An Unconstitutional Condition On The Exercise Of First Amendment Rights.

A. The doctrine of "unconstitutional conditions" is well established in this Court's decisions and need not be elaborately rehearsed here. Obviously, not every governmental benefit derives from an underlying constitutional entitlement. But "even though a person has no 'right' to a valuable governmental benefit, and even though the Government may deny him the benefit for any number of reasons," it may not deny him the benefit "on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972). *Accord*, *Thomas* v. *Review Board*, 450 U.S. 707, 716-18 (1981); *McDonald* v. *Paty*, 435 U.S. 618, 626 (1978); *Elrod* v. *Burns*, 427 U.S. 347, 355-59 (1976) (plurality opinion). When the Government conditions the availability of benefits on the surrender of constitutional rights, it "effectively penalizes the free exercise" of those rights, permitting it to achieve indirectly a result that it could not directly command. *Sherbert* v. *Verner*, 374 U.S. 398, 404-06 (1963). And the penalty need not be severe for the condition to be invalid: "This Court's decisions have prohibited conditions on public benefits . . . which dampen the exercise generally of First Amendment rights, however slight the inducement to the individual to forsake those rights." *Elrod*, 427 U.S. at 358 n.11.

The "unconstitutional conditions" doctrine applies with full force here. Legislative activity is clearly protected by the First Amendment. *Eastern R.R. Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961). Corporate entities possess First Amendment rights no less than individuals. *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U.S. 530, 533 (1980). And this Court

has specifically held that the "unconstitutional conditions" doctrine operates to bar the state from conditioning the availability of tax benefits on the surrender of First Amendment rights. *Speiser* v. *Randall*, 357 U.S. 513, 518-19 (1958) (rejecting the argument that, "because a tax exemption is a 'privilege' or 'bounty,' its denial [cannot] infringe speech").

The lobbying provisions of the Internal Revenue Code condition the availablity of valuable Government benefits on charities' surrender of their constitutional right to engage in "substantial" legislative advocacy. If a charitable organization is unwilling to accept this condition, it is penalized by being denied tax benefits that are accorded to all other charities—exemption from federal income tax, and the ability to solicit contributions that donors may deduct for income, estate, and gift tax purposes. Under this Court's decisions, therefore, the application of the "unconstitutional conditions" doctrine to the challenged lobbying provisions seems clear.

B. The Government in its Brief does not specifically address the "unconstitutional conditions" doctrine. Rather, it cites this Court's decision in *Cammarano* v. *United States*, 358 U.S. 498 (1959), and relies exclusively on that decision for the proposition that "this case does not involve any governmental restriction of First Amendment rights." Br. 21. The Government loads *Cammarano* with more freight than it can bear.

Cammarano involved an IRS prohibition against a business taxpayer's deduction of expenses incurred to influence legislation. The Court rejected the argument that denial of the deduction imposed an unconstitutional condition on First Amendment rights. *Id.* at 513. "Petitioners," the Court held, "are not being denied a tax deduction because they engage in constitutionally pro-

tected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code." *Id.* Justice Douglas elaborated this point in his concurrence:

> If Congress had gone so far as to deny *all* deductions for ordinary and necessary business expenses if a taxpayer spent money to promote or oppose [legislation], then it would be placing a penalty on the exercise of First Amendment rights. That was in substance what a State did in *Speiser* v. *Randall* . . . Congress, however, has taken no such action here. It has not undertaken to penalize taxpayers for certain types of advocacy; it has merely allowed some, not all, expenses as deductions. *Id.* at 515 (emphasis added).

The key to the Court's reasoning in *Cammarano* was the fact that the tax benefit denied (a deduction for lobbying expenses) was precisely correlated with, and directly proportional to, the lobbying activity undertaken. It was this correlation that enabled the Court to characterize the Government's denial of tax benefits as a mere unwillingness to subsidize speech, rather than as an attempt to penalize it. By lobbying, the taxpayer in *Cammarano* incurred no governmentally-imposed detriment other than the Government's refusal to pay, *via* the grant of a tax deduction, approximately half his lobbying costs. *Cammarano* holds that this is constitutionally permissible, and that is all it holds on this score.

This case differs fundamentally from *Cammarano* because it involves precisely the sort of penalty that the taxpayer in *Cammarano* could not show. The tax benefits denied to charities that engage in "substantial" lobbying are in no sense correlated with or proportional to the amount of legislative activity they undertake. The char-

ity is not merely required to pay additional tax approximating half its lobbying costs; it is required to forfeit its tax exemption, *i.e.*, to pay additional tax approximating half its total income.[6] In effect, the lobbying restrictions do to charities precisely what Justice Douglas in his *Cammarano* concurrence said the Government could not do—deny *all* tax benefits to organizations that spend money to promote legislation.[7]

Yet the penalty visited on charities that engage in "substantial" lobbying does not stop at loss of tax exempt status. The charity also loses the right to receive contributions that are tax-deductible by its donors. Whereas the taxpayer in *Cammarano* was barred from using tax-deductible funds for lobbying activity, the charity is effectively barred from using tax-deductible funds for *any* activity, be it lobbying, book publishing, or scientific research. The denial of the right to receive deductible contributions is a virtual death sentence for most charities. As this Court has noted, appearance on the IRS

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[6] The differential tax effect can best be illustrated by an example. Compare a business corporation and a charity, each with $1.1 million of income and $100,000 of lobbying expenses. Assume that each is taxed at a flat 50% rate. If the corporation is denied a deduction for its lobbying expenses, its tax bill will rise from $500,000 to $550,000. If the charity is deemed to have engaged in "substantial" legislative activity by virtue of its lobbying, its tax bill will rise from zero to $550,000, an increase 11 times as large. In the latter case, the Government's imposition of $550,000 in additional tax obviously goes beyond a mere "refusal to subsidize" the charity's lobbying outlay of $100,000.

[7] *See Harris* v. *McRae*, 448 U.S. 297, 317 n.19 (1980) (distinguishing between Congress' "refusal to fund protected activity" and its "imposition of a 'penalty' on that activity," and stating that "a substantial constitutional question would arise" if Congress sought to deny *all* Medicaid benefits to women who exercised their right to abortion).

Cumulative List of entities entitled to receive tax-deductible contributions "is a prerequisite to successful fund raising for most charitable organizations, [since] many contributors simply will not make donations to an organization that does not appear on the Cumulative List." *Bob Jones University* v. *Simon*, 416 U.S. 725, 729-30 (1974).

In sum, because of the massive and wholly disproportionate sanctions menacing charities that engage in "substantial" lobbying, the Government is mistaken in its belief that mere citation of *Cammarano* suffices to answer charities' First Amendment claims. The disproportionality of these sanctions goes beyond a "mere refusal to subsidize" legislative advocacy and generates the penalty—the *sine qua non* of the "unconstitutional conditions" doctrine—that was absent in *Cammarano*.[8]

C. The Court of Appeals recognized that *Cammarano* by itself does not represent a satisfactory answer to the "unconstitutional conditions" argument. The Court stated that the argument "would . . . be troublesome if it were the case that the government conditioned its provision of tax benefits on a charitable organization's waiver of First Amendment rights." J.S. App. 33a. In testing the validity of this premise, however, the Court said it was

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[8] The Government argues that the denial of tax benefits is "no broader than necessary to accomplish the underlying congressional purpose and [does] not 'penalize' [charities] for the content of [their] advocacy." Br. 23 n.10. This argument is phrased so as to avoid facing the key question. *Amici* do not contend that the lobbying restrictions penalize charities for *the content* of their advocacy, nor does the "unconstitutional conditions" doctrine hinge on proof of a content-based restriction. The question under *Cammarano* is whether the Government has undertaken to penalize, rather than merely declined to subsidize, speech. The challenged lobbying restrictions clearly penalize charities *for their advocacy*.

necessary to look, not only at section 501(c)(3), but also at section 501(c)(4). When these two sections are read together with *Cammarano*, the Court concluded, any suggestion that charities must waive First Amendment rights in order to receive tax benefits is "overly mechanistic." J.S. App. 34a.

Section 501(c)(4), in conjunction with section 501(a), provides a tax exemption for "social welfare organizations." Unlike charities, social welfare organizations may lobby at will without forfeiting tax-exempt status; unlike charities, however, they generally cannot receive tax-deductible contributions. The Court of Appeals suggested that a charity, taking advantage of these provisions, "can easily structure itself along dual lines," carrying on its lobbying activities through a section 501(c)(4) affiliate and conducting its other charitable activities itself. J.S. App. 34a. Under this "dual organizational structure," the Court said, a charity that lobbies incurs no greater denial of tax benefits than the taxpayer incurred in *Cammarano:* the charity continues to receive tax-deductible contributions; its income and its affiliate's income continue to be tax-exempt; but its lobbying affiliate simply cannot lobby with tax-deductible funds. It was this possibility of a binary structure that converted the governmental sanction, in the Court of Appeals' view, from a "penalty" on lobbying to a "mere refusal to subsidize" it, thus making *Cammarano's* analysis apt.

The Court of Appeals' approach hardly represents standard First Amendment analysis under the decisions of this Court. The question posed was whether charities are in fact required to waive First Amendment rights as a condition of receiving tax benefits. The Court of Appeals' answer, in effect, was to concede that a charity is indeed required to waive such rights, but to assert that, with the

aid of sophisticated tax planning, the charity can find someone else to exercise its rights for it. That course of action, however, would not protect *the charity's* rights. While this Court has often approved government regulations affecting the "time, place, and manner" of speech, it has never suggested that the Government may regulate speech by forcing an entity possessed of First Amendment rights to speak through someone else.

Indeed, this Court rejected a similar argument in *Healy* v. *James*, 408 U.S. 169 (1972). In that case, students at a state college formed a chapter of Students for Democratic Society ("SDS"). They applied to the college unsuccessfully for official recognition as a "campus organization," a status that would have permitted them to use college bulletin boards and hold meetings in campus buildings. This Court held that the college's denial of recognition violated the group's First Amendent rights. The Court rejected the contention that the group's ability to meet off campus, or to meet informally on campus in a capacity other than as a chapter of the SDS, eliminated the First Amendment problem. "The group's possible ability to exist outside the campus community," the Court concluded, "does not ameliorate significantly the disabilities imposed by the [college's] action." *Id.* at 183.

This Court's reasoning in *Healy* demonstrates that a charity cannot be compelled, consistently with the First Amendment, to exercise its free speech rights vicariously. The college in *Healy* conditioned the availability of governmental benefits (use of campus facilities) on the students' waiver of First Amendment rights (the right to associate freely as members of SDS). The fact that First Amendment rights could have been exercised indirectly—by an off-campus branch of SDS, by a different on-campus organization, or by the students individually—was found irrelevant to the constitutional

outcome. *Healy* indicates that, if an entity possesses First Amendment rights, its coerced waiver of those rights is no more acceptable, constitutionally, because of the possibility that a different entity might exercise those rights in its stead.

D. Theoretically, the Court of Appeals' approach might be reconciled with *Healy* by contending that a charity and its hypothetical lobbying affiliate, while nominally separate, would not really have to be different entities at all. If it were true that a lobbying affiliate could function as a charity's *alter ego*—as a mere paper entity or incorporated pocketbook for financing the charity's legislative program—the Court of Appeals' approach would arguably be correct. For in that event the "dual organizational structure" would not compel the charity to waive its rights and speak vicariously; the charity could continue, in essence, to exercise its rights itself.

An attempt to rationalize the Court of Appeals' approach along these lines does not withstand analysis. As a matter of law, a lobbying affiliate cannot be a mere paper entity or rubber stamp for a charitable organization without endangering the charity's tax-exempt status.

Section 501(c)(3) prohibits charities from engaging in substantial legislative advocacy. If persons connected with a charity form a section 501(c)(4) affiliate, the Service will properly insist that none of the charity's resources be used to support activities of the affiliate—such as lobbying activities—that the charity could not have conducted directly. To avoid jeopardizing the charity's tax-exempt status, therefore, the two organizations must take great care to maintain independence and separation of functions.

The nature of the relationships that may properly subsist between a public charity and a section 501(c)(4) affili-

ate is unclear under present law. Neither the Code nor the regulations provide any guidance as to whether a charity and a lobbying affiliate would be allowed to share facilities and research, to have officers and directors in common, to have complementary strategies and policy priorities. Under these circumstances, the permissible contours of the "dual organizational structure" will in practice be extensively controlled by IRS enforcement policy.

The Service's past practice, both in considering exemption requests and in auditing charitable organizations, indicates that it scrutinizes relationships between affiliates to ensure that charities do not indirectly support lobbying. The IRS has ruled that a charity and an affiliate must, at an absolute minimum, be separately incorporated and have separate records and books of account. Rev. Rul. 77-232, 1977-2 C.B. 71. The IRS has challenged (or suggested that it might challenge) a charity's tax exempt status if the charity controls the policy positions taken by a lobbying affiliate;[9] if the affiliate exploits the charity's study and research for lobbying purposes;[10] if the charity shares facilities, policy priori-

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[9] In Rev. Rul. 72-513, 1972-2 C.B. 246, the Service considered whether lobbying activity of a student-run newspaper should be imputed to the sponsoring university, a section 501(c)(3) organization, where the university provided the paper with office space and shared personnel. Although holding that imputation was not required, the Service premised its conclusion on the fact that "neither the university administration nor the [shared personnel] exercise any control or direction over the newspaper's editorial policy." *Id.* at 246.

[10] *See* IRS, Exempt Organization Handbook ¶ 392(5) (1982) (stating that "study, research, and discussion" may constitute *de facto* lobbying activity if they serve "as a preparatory stage for the advocacy of legislation").

ties, and overall strategy with the affiliate;[11] or if the charity and the lobbying organization have substantially identical directors and personnel.[12] The IRS position on these matters has fluctuated over time, and its posture at any given moment may be less restrictive than these examples suggest. However, given the Service's broad administrative discretion and the severe penalties that attend any miscalculation, a charity could not prudently control the activities of its lobbying affiliate without risking its own tax exemption. And if a charity cannot safely control the activities of its affiliate, the affiliate cannot be a proxy for exercise of the charity's First Amendment rights.

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[11] *See Center on Corporate Responsibility, Inc.* v. *Shultz*, 368 F.Supp. 863, 875-76 (D.D.C. 1973). The IRS there denied a tax exemption to a non-profit organization, citing its "sharing of personnel and office space" with a non-exempt affiliate, the two organizations' "apparent common control," their interlocking directorates, and the interrelationship of their proposed litigation and research programs. In the words of the district judge, the Service argued that the Center and its affiliate were in effect "one entity since they have the same purposes and goals, and participate in several of the same type of activities . . . to achieve those goals." *Id.* at 876. The court rejected the Service's position and held the Center entitled to exemption.

[12] In 1957, the Service audited the NAACP and its section 501(c)(3) affiliate, the NAACP Legal Defense and Educational Fund. Although the two organizations maintained a high degree of operational independence, the IRS questioned the Fund's tax-exempt status in view of its close relationship with the NAACP, which engaged in "substantial" legislative activity. In response to IRS pressure, the Fund severed all connections with its parent organization, resolving that "no person should be a Board Member, officer or employee of this corporation who is also a Board Member, officer or employee of the NAACP." *See* Memorandum of Law in Support of Defendant's Motion for Summary Judgment, *National Association for the Advancement of Colored People* v. *N.A.A.C.P. Legal Defense and Educational Fund, Inc.*, Civil Action No. 82-1424 (S.D.N.Y. 1982).

E. Quite apart from this analysis, the "dual organizational structure" envisioned by the Court of Appeals is encumbered by serious practical problems which that Court failed to consider. It would not be possible for a charity desirous of establishing a lobbying affiliate to comply with modest formal niceties and continue its operations essentially unchanged—directing its donors, as it were, simply to address contributions to a different box on the charity's organizational chart. To the contrary, the Court of Appeals' suggestion would necessitate real operating changes and impose substantial additional costs. These impediments constitute a separate and independently sufficient ground for rejecting the "dual organizational structure" as an answer to charities' First Amendment claims.

The most obvious problems imported by the "dual organizational structure" would be the considerable burdens of establishing and operating the section 501(c)(4) organization. The new entity would have to be formally incorporated under state law, secure federal tax exemption, and qualify under state charitable solicitation and exemption statutes.[13] It would have to file registration forms with most States and some localities in which it proposed to solicit contributions, and it would have to file annual reports with these governments and with the IRS. If the affiliate shared office space or personnel with the charity, detailed accounting records would have to be kept to allocate salaries, rent, and overhead expenses in

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[13] The burdens imposed by state and local solicitation laws, which typically include some combination of licensing fees, cost limitations, bonding requirements, and annual financial reports, can be severe. *See Village of Schaumburg* v. *Citizens For A Better Environment*, 444 U.S. 620, 622-25 (1980) (holding unconstitutional a municipality's imposition of fixed percentage cost restrictions on charitable solicitation).

order to convince the IRS that the charity did not subsidize the affiliate's lobbying. The vast majority of this Nation's charities are small local organizations; these organizations lack the money, tax expertise, and accounting sophistication to take such steps "easily."

Second, the proposed "dual organizational structure" would hobble the fundraising process. Fundraising appeals on behalf of the charity and its lobbying affiliate would have to be separated so as to avoid misleading donors about the deductibility of their gifts. But fundraising solicitations from similar-sounding organizations, appealing to essentially the same pool of prospective donors, present serious practical problems. Experience shows that such parallel solicitations confuse the public; alienate donors (who resent being dunned twice); and diminish the aggregate amount contributed.

Third, the proposed "dual organizational structure" would entail a very substantial increase in the charity's cost of communicating with its members. Charitable organizations qualify for special postage rates, generally about half the comparable commercial rates. U.S. Postal Service, Domestic Mail Manual § 611.2b (1982). Section 501(c)(4) organizations, by contrast, are generally not entitled to these low rates, since "promotion of social welfare" is not one of the qualifying purposes set forth in the Domestic Mail Manual. *See Sierra Club* v. *U.S. Postal Service*, 549 F.2d 1199, 1200-01 & n.2 (9th Cir. 1976). While some social welfare organizations have succeeded in qualifying on the ground that they also have "educational" purposes, it is most unlikely that the lobbying affiliate envisioned by the Court of Appeals could so qualify. By hypothesis, its sole activity will be lobbying, and the Postal Service does not regard lobbying as "educational" activity within the meaning of the Domestic Mail Manual. *See National Rifle Ass'n* v. *U.S. Postal*

Service, 407 F. Supp. 88, 90-91 (D.D.C. 1976). The lobbying affiliate's inability to secure preferential postage rates would constitute a formidable additional cost of the "dual organizational structure."

Finally, the "dual organizational structure" would create a real risk of destroying the cohesiveness of the charitable enterprise. Facing fundraising constraints, IRS scrutiny, and the need to operate independently, the charity and its lobbying affiliate will naturally tend to develop along divergent paths. A pointed example of this tendency is furnished by the NAACP and its section 501(c)(3) affilate, the NAACP Legal Defense and Educational Fund. Forced by IRS pressure to divorce their operations because of the NAACP's legislative activity, the two organizations are now suing each other in federal court. *See* p. 17 n.12 *supra*. The issue that divides them—a matter of ominous significance here—is the use for fundraising purposes of the "NAACP" name. No charity should be required to run such risks in order to exercise its First Amendment rights.

F. In sum, the "dual organizational structure" is no answer to a charity's claim that its speech has been unconstitutionally restricted. The lobbying provisions of the Code undeniably force charities to waive free speech rights as a condition of receiving tax benefits. The Court of Appeals discounted this forced waiver by reasoning that charities could establish lobbying affiliates to exercise their rights for them. Under standard First Amendment analysis, however, a charity cannot be made to find someone else to exercise its right to free speech; it is entitled to speak for itself. Nor can speech by proxy be rationalized on the theory that the affiliate would be a mere *alter ego;* a charity could control the operations of its lobbying affiliate to that extent only by risking an IRS challenge to its own tax exemption. And even if the Court

of Appeals' proposal were otherwise viable, its suggestion that a charity can "easily structure itself along dual lines" ignores the substantial costs such a reorganization would entail.

III. Tested Under The Strict Scrutiny That Is Appropriate Here, The Restrictions On Charities' Legislative Activities Must Be Invalidated.

Because they impose a condition on the exercise of First Amendment rights, the challenged lobbying provisions are subject to the "exacting scrutiny necessitated by a state-imposed restriction of freedom of speech." *First National Bank* v. *Bellotti*, 435 U.S. 765, 786 (1978). To be sustained, governmental restrictions of speech must pass a two-part test. First, the Government must show that the restrictions are justified by a compelling state interest. *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U.S. 530, 540 (1980). Second, the Government must prove that the restrictions are "closely drawn to avoid unnecessary abridgment" of First Amendment rights. *First National Bank*, 435 U.S. at 786. *Accord*, *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U.S. 557, 565 (1980); *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960). Tested under these criteria, the challenged lobbying restrictions cannot stand.

A. The Lobbying Restrictions Do Not Serve Any Compelling State Interest Nor Are They Closely Drawn To Serve The Interests Invoked In Their Defense.

1. The principal Government interest said to justify the challenged lobbying restrictions is the supposed need to ensure "governmental neutrality with respect to lobbying activities." J.S. App. 58a; Br. 27. This rationale has its roots in *Cammarano*, where this Court spoke of a "sharply defined national policy" that "everyone in the community should stand on the same footing as regards

[legislative activity] so far as the Treasury of the United States is concerned." 358 U.S. at 508, 512-13.

As the Court of Appeals correctly observed, the tax policy on lobbying has changed fundamentally since *Cammarano* was decided. In 1962, Congress amended the Code to permit businesses to deduct expenditures incurred in direct (non-grassroots) lobbying. *See* IRC § 162(e).[14] Members of labor unions and trade associations can now deduct under section 162 the portion of their dues expended on direct lobbying. Treas. Reg. § 1.162-20(c)(3). And veterans' organizations can lobby without restriction yet retain their full panoply of tax benefits, a situation that existed in 1959 but that apparently was not called to this Court's attention. Whatever may have been true in the past, the Government no longer maintains toward lobbying what Justice Douglas in *Cammarano* described as "a complete hands-off policy." 358 U.S. at 515.

Moreover, even if neutrality remained a compelling state interest, the challenged lobbying restrictions are not "narrowly drawn" to serve it. *Village of Schaumburg*, 444 U.S. at 637. The essence of the neutrality policy described in *Cammarano* was that the Treasury would refrain from subsidizing speech; everyone in the community would "simply [be] required to pay for [his lobbying] activities entirely out of [his] own pockets." 358 U.S. at 513. The challenged restrictions, however, cannot be de-

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[14] Representatives of the American Bar Association described the effect of this amendment: "Now that direct business lobbying has become a deductible activity under section 162(e), the former 'neutral posture of the tax law with respect to lobbying' . . . has been upset in favor of the business interests as opposed to the charitable organizations." Statement of the American Bar Association, *Influencing Legislation by Public Charities: Hearings on H.R. 13500 Before the House Comm. on Ways and Means*, 94th Cong., 2d Sess. 68 (1976).

scribed as a mere refusal to subsidize charities' legislative advocacy; they affirmatively penalize charitable lobbying. *See* pp. 10-12 *supra*. Obviously, the Government is not neutral about legislative activity when it penalizes people for engaging in it.

2. A second governmental objective said to justify restrictions on charities' legislative activities is "prevention of abuse." J.S. App. 58a. It is important to be clear on the nature of the "abuse" referred to. As noted previously, legislative advocacy in furtherance of a charity's philanthropic purposes is entirely proper. It cannot be contended, therefore, that charitable lobbying is *inherently* abusive, or that limitations on such lobbying are justifiable as restricting charities to their proper "charitable" sphere.[15] The abuse to be prevented, rather, is the abuse that triggered enactment of the lobbying provisions in 1934—the "abuse of charitable lobbying by private interests." J.S. App. 58a. As one of the bill's spokesmen said, "There is no reason in the world why a contribution [should be deductible] if it is a selfish one made to advance the personal interests of the giver of the money." 78 Cong. Rec. 5861 (1934) (Sen. Reed).

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[15] Both the dissent below, J.S. App. 96a-97a, and the Government, Br. 23 n.10, suggest that lobbying represents a "nonexempt purpose" for a charity, *i.e.*, that lobbying is inherently "noncharitable." This suggestion confuses means with ends, activities with purposes. Legislative activity is employed by charities as a means to achieve a goal; if the goal is "charitable," a charity is engaged in "charitable" activity when it pursues that goal by any proper means, be it legislative action or action of some other sort. *See* pp. 3-6 *supra*. Indeed, Congress' enactment in 1976 of section 501(h), which permits charities (other than churches, excluded at their own request) to devote up to 20% of their "exempt purpose expenditures" to influencing legislation, makes it clear that Congress does not view lobbying as a "nonexempt purpose" or as "noncharitable" *per se*. *See* p. 26 *infra*.

Amici agree that preventing abuse of charitable lobbying by private interests is a valid governmental objective. But this objective is not rationally advanced by blanket restrictions on the legislative activity of every charity in the Nation. The Government may pursue its legitimate objectives, but it "must do so by narrowly drawn regulations designed to serve those [objectives] without unnecessarily interfering with First Amendment freedoms." *Village of Schaumburg*, 444 U.S. at 637. The IRS already has at its disposal, entirely apart from the lobbying restrictions, "narrowly drawn" means of accomplishing Congress' goal.

No organization can secure and maintain tax exemption as a "public charity" unless it passes three qualifying tests. It must be organized and operated exclusively for public purposes rather than "for the benefit of private interests." Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii). No part of its resources may "inure to the benefit of any private shareholder or individual." IRC § 501(c)(3). And it must have broad public support. IRC § 509(a); Treas. Reg. § 1.509(a)-3(a). The separate prohibitions against private benefit, coupled with the necessity of retaining widespread public support, are sufficient to ensure that public charities steer clear of the abuse Congress aimed to prevent in 1934. If a charity is unfaithful to its trust—if it lobbies on behalf of private interests, or engages in other activity designed to further private interests—the answer is to revoke its tax exemption because it is not "operated exclusively for charitable purposes" within the meaning of section 501(c)(3). The answer is not to restrict the legislative activity of all public charities in the Nation.

In sum, while "prevention of abuse" represents a valid governmental objective, the challenged lobbying restrictions are not "closely drawn" to serve that goal. The vice

of charitable lobbying in furtherance of private interests is not that it is lobbying, but that it is not "charitable." It is unjustifiable to restrict the First Amendment rights of all charities out of fear that some may employ legislative activity—an entirely proper means—to an improper end. As applied to public charities, the lobbying restrictions are plainly unconstitutional.

3. Other governmental interests said to support the challenged lobbying provisions are weak, if not improper. The Government contends that the restrictions are needed to preserve "balance" between the lobbying activities of charitable organizations and other groups. Br. 27. Alternatively, the Government suggests that Congress, absent the lobbying provisions, will be overwhelmed by the emissaries of philanthropy. *See* Br. 8; p. 6 n.4 *supra*. But "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley* v. *Valeo*, 424 U.S. at 48-49. By enacting section 162(e), Congress has extended its welcome to lobbyists from business and labor. Any attempt to restrict the access of other speakers in the interests of some notional "balance" is not a constitutionally valid objective, much less a compelling governmental interest.

B. Section 501(h) Is Irrelevant To The Constitutionality Of The Challenged Lobbying Restrictions.

In his dissent below, Judge MacKinnon argued that Code section 501(h), enacted in 1976, provides "a source of guidance in evaluating the existing scope of section 501(c)(3)" and "compels the conclusion that section 501(c)(3) is valid." J.S. App. 101a & n.25. The Government similarly contends that section 501(h) "represents a considered accommodation" between charities' First

Amendment rights and its need to restrict lobbying. Br. 38-39 n.20. The Court of Appeals rejected these arguments, holding that section 501(h) was not before it and was "of little relevance" to the question presented here. J.S. App. 19a n.6. The Court of Appeals was correct.

Section 501(h) permits charities to elect to have their legislative activity restricted by percentage limitations rather than by the vague contours of the "substantial" test.[16] Public charities, other than churches and church-affiliated organizations, may elect its coverage. IRC § 501(h)(5). An electing charity may generally devote, without penalty, a specified percentage of its "exempt purpose expenditures" to lobbying; the specified percentage is determined by a sliding scale, beginning at 20% for the smallest organizations and approaching 5% for the largest. IRC § 4911(c)(2). Regardless of these percentage limitations, no organization's permissible expenditures (either for direct or grassroots lobbying) may exceed a fixed dollar ceiling. IRC § 4911(c)(2) & (4). "Excess lobbying expenditures" are subject to a 25% excise tax. IRC § 4911(a)(1). A charity that normally exceeds the limitations by specified amounts loses its tax exemption. IRC § 501(h)(1).

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[16] Neither the Code nor the regulations suggest any percentage equivalent for the quantum of legislative activity that will be deemed "substantial," and the courts have almost uniformly refused to provide one. *See, e.g., Haswell* v. *United States*, 500 F.2d 1133, 1142 (Ct. Cl. 1974), *cert. denied*, 419 U.S. 1107 (1975) (holding a percentage test "inappropriate"); *Christian Echoes Nat'l Ministry* v. *United States*, 470 F.2d 849, 855 (10th Cir.), *cert. denied*, 414 U.S. 864 (1973). *But see Seasongood* v. *Commissioner*, 227 F.2d 907 (6th Cir. 1955) (holding 5% "insubstantial"). The IRS takes the position that the determination of substantiality "is a factual one, and there is no simple rule as to what amount of activities is substantial." IRS, Exempt Organization Handbook ¶ 394(1) (1982) (rejecting 5% test).

This case involves the constitutionality of the "substantial" test of section 501(c)(3), not the constitutionality of section 501(h). The "substantial" test and section 501(h) impose discrete sets of restrictions on charitable lobbying. Appellee's legislative activity is in fact restricted by the "substantial" test, because appellee did not elect coverage under section 501(h). J.A. App. 19a n.6. The legislative activity of most section 501(c)(3) organizations is in fact restricted by the "substantial" test, because only about 7% of the Nation's eligible charities have elected coverage under section 501(h), owing mainly to the complexity of the attendant rules and the burdensomeness of the reporting and recordkeeping requirements.[17] And the legislative activity of many section 501(c)(3) organizations is *necessarily* restricted by the "substantial" test, since churches and church-affiliated organizations are not even allowed to elect coverage under section 501(h). The "substantial" test, in short, is either constitutional or it is not. Its validity cannot logically be affected by the constitutionality of another Code section which does not apply to appellee, which does not apply to most charities, which cannot apply to many charities, and which is not contested here.

Even if section 501(h) were relevant, it would make no difference in assessing the constitutionality of the challenged lobbying restrictions. Section 501(h) simply imposes a new set of limitations on legislative activity in lieu of those imposed by section 501(c)(3). For smaller charities, the section 501(h) limitations are probably less

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[17] Recent IRS information indicates that at most 16,162 charities (of approximately 234,000 eligible charities) elected coverage of section 501(h) between January 1977 and June 1982. The number of charities actually electing coverage is probably smaller; elections and revocations of elections are effected on the same IRS form, and the Service merely counts the number of forms filed.

restrictive in percentage terms than those of the "substantial" test; for larger charities they are probably more so, owing to the fixed dollar ceiling. As the Court of Appeals correctly noted, however, "all charities . . . continue to have their lobbying restricted under one standard or the other," J.S. App. 19a & n.6; and all charities that lobby beyond a congressionally-approved level face penalties, including loss of tax exemption and the right to receive deductible contributions, under one standard or the other. Section 501(h), while importing new ambiguities of its own,[18] may mitigate the vagueness of the "substantial" test for charities that are able and willing to elect it. But it has no effect, *in principle*, on the "unconstitutional conditions" argument. It simply changes the mix of restrictions and penalties that afflict legislative activity by a given charity of a given size on a given set of facts.

C. The Proper Remedy Is To Invalidate The Challenged Lobbying Restrictions.

The restrictions on legislative activity contained in section 501(c)(3) violate public charities' First Amendment rights. The portion of section 501(c)(3) that conditions the grant of tax benefits on proof that "no substantial part of [a charity's] activities . . . is carrying on propaganda, or otherwise attempting, to influence legislation" should accordingly be declared unconstitutional.

The Court of Appeals, having decided this case on Equal Protection rather than First Amendment grounds, faced a choice of constitutional remedies. Instead of selecting a remedy itself, it remanded the case to the

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[18] The Treasury's regulations under section 4945, defining terms similar to those used in sections 509(h) and 4911, proliferate over seven pages of elaborate (and controversial) definitions. *See* Treas. Reg. § 53.4945-2.

district court "with the instruction that it cure the constitutionally invalid operation of Section 501(c)." J.S. App. 77a. The Government characterizes the remand as the "imposition of the duties and responsibilities of a legislative committee upon a federal district court." Br. 10-11. The Government's "separation of powers" concerns, tenuous in any event, simply disappear if this case is decided on First Amendment grounds. There is in that event no choice of remedies; the only remedy—which flows inevitably from the nature of the constitutional defect—is to declare the "substantial" test invalid.[19]

The First Amendment remedy possesses obvious advantages over its Equal Protection counterpart. It deals surgically with the constitutional defect; it avoids comparison among nonprofit organizations; it carries no adverse consequences for persons not before the Court; and it avoids the line-drawing problems that are particularly awkward in the tax field. *Amici* respectfully urge this Court to adopt the First Amendment remedy here.

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[19] Invalidation of the "substantial" test does not mean that Congress is incapable of crafting a valid lobbying provision. As noted above, the Government has a legitimate interest in preventing "abuse of charitable lobbying by private interests." *See* p. 24 *supra*. Thus, a provision that barred charities from engaging in legislative activity that did not further their charitable objectives would possess no First Amendment infirmity.

CONCLUSION

The judgment of the Court of Appeals should be affirmed as to the unconstitutionality of section 501(c)(3), and modified to eliminate remand to the District Court.

Respectfully submitted,

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